

base forfeiture would be appropriate for the reasons stated herein.

I. DISCUSSION

A. Capitol Did Not Willfully or
Maliciously Interfere With the
Radio Communications of Other
Private Carrier Paging
Stations

1. The NAL alleges that Capitol "appeared to have willfully" caused harmful interference to a co-channel licensee and that Capitol's transmissions were apparently "intended to cause harmful interference" to such co-channel licensee in violation of Section 333 of the Act. Section 333 of the Act prohibits any person from willfully or maliciously interfering with the radio communications of any other licensee.

2. As indicated on its face, this statute prohibits deliberate acts by persons with actual intent to cause interference with a licensee's transmissions. The legislative history accompanying the bill in which Section 333 of the Act was first enacted further makes clear that the underlying purpose of the statute was to prohibit actions which are expressly designed to cause interference such as "intentional jamming" and "deliberate transmission on top of the transmissions of authorized operators already using specific frequencies in order to obstruct their communications." See H.R. Rept. No. 316, 101st Cong., 2d Sess. 8, reprinted in 1990 U.S. CODE CONG. & ADM. NEWS 1294, 1301.

3. As shown by the Declarations of Messrs. Raymond and Harrison, which are attached hereto as Exhibits A and B, respectively, Capitol was testing its PCP system during the Spring and Summer of 1991 for the legitimate purpose of attempting to provide "group call" service to members of the Greenup County Rescue Squad. Testing of the "group call" feature was not motivated by any malice or intent on the part of Capitol to cause interference to co-channel licensees. Apparently based upon the number of tests conducted by Capitol, the NAL improperly infers that Capitol deliberately sought to interfere with the transmissions by co-channel licensees on the frequency. In fact, however, the repeated testing by Capitol was necessary because Capitol was unable to get the "group call" feature to function properly.

4. Moreover, contrary to the allegation in the NAL, the declarations show that in fact Capitol's PCP system was equipped with a properly functioning inhibitor which prevents transmissions by Capitol while co-channel stations are operating. Under these circumstances, any "harmful interference" that otherwise could be thought to have occurred during the period in question could not plausibly be deemed willful or malicious on Capitol's part.

5. Because Capitol was testing its system for the reasonable and legitimate purpose of attempting to provide service to the Rescue Squad, and because its system was equipped with a properly functioning inhibitor, Capitol's actions in testing its system did not violate Section 333 of

the Act. Therefore, no forfeiture of any amount is warranted under this count.

B. Capitol Took Reasonable
Precautions to Avoid Causing
Harmful Interference

6. The NAL also cites Capitol for its apparent violation of Section 90.403(e) of the Commission's rules, which requires that:

"Licensees shall take reasonable precautions to avoid causing harmful interference. This includes monitoring the transmitting frequency for communications in progress and such other measures as may be necessary to minimize the potential for causing interference."

7. The declarations demonstrate that Capitol's PCP system uses an inhibitor to "lock out" its transmitter when other co-channel licensees are transmitting pages, and that it was functioning properly throughout August 1991. Use of this type of device is acceptable industry practice for preventing interference to co-channel licensees, and was a reasonable precaution for Capitol to take.

8. Furthermore, because Capitol's and RAM Technologies' PCP system transmitters serving Charleston and Huntington operate on a simulcast basis, use of the inhibitor should have been sufficient to prevent interference by Capitol to WNJN-621, and Mr. Raymond believes that its test transmissions did not, in fact, cause harmful interference. Capitol therefore took reasonable precautions to avoid causing interference to co-channel

licensees through its use of an inhibitor, thereby complying with Section 90.403(e) of the Commission's rules.

Accordingly, no forfeiture against Capitol is warranted.

C. Capitol's Testing Did Not
Violate the Prohibition in
Section 90.405(a)(3) Against
Excessive Testing

9. The NAL also cites Capitol for its apparent violation of Section 90.405(a)(3) of the rules based upon the determination that Capitol failed to keep its testing to a minimum. However, as discussed above, repeated testing by Capitol was reasonable and necessary as part of its efforts to resolve the technical problems encountered in attempting to provide "group call" service to a customer. Indeed, the steps taken by Capitol were part of a rational and systematic approach to resolving the technical problems with the service.

10. Capitol first attempted to make the "group call" feature work by trying each of the different telephone network interconnection arrangements for accessing the paging system. Having eliminated those arrangements as the source of the difficulty Capitol was experiencing, and believing that the problem instead may have resulted from interference caused by the transmissions of RAM Technologies, Capitol then tested different "link" frequencies between its Charleston terminal and the Huntington base station. In addition, Mr. Harrison used the auto-test feature during his drive home from Huntington to

Charleston to check overall system coverage. Finally, Capitol tested the system late at night to see if the problems resulted from co-channel interference.

11. Despite its considerable effort, Capitol never did get the "group call" feature to work, and finally abandoned the project. Capitol should not be penalized, however, for its diligent attempts to solve technical problems with its system. In fact, Capitol expended extraordinary time and resources attempting to provide service to the Rescue Squad -- a public safety organization -- which likely would never be recouped from the relatively small amount of service revenues Capitol might eventually realize from the Rescue Squad. Under these circumstances, Capitol should be commended for its diligence and its community service, not penalized with a forfeiture. Therefore, Capitol should not be held liable for forfeiture under Section 90.405(a)(3) of the Commission's rules.

D. Capitol Did Not Intentionally
Place the Morse Code
Identification on the
Incorrect Setting

12. The NAL also cites Capitol for violating Section 90.425(b)(2) of the Commission's rules because its morse code identification was transmitting on too slow a speed. Although the Raymond acknowledges that he has since learned that the setting was on the wrong speed, the mistake was inadvertent and occurred despite Capitol's verification of compliance -- in the presence of the Commission's inspectors

-- directly with the manufacturer of the paging terminal which controls these transmissions.

13. Violations of the rules must be "willful" in order for forfeitures to properly lie. Capitol's violation of the morse code speed should not be deemed "willful" because it affirmatively attempted to comply with the rule and reasonably believed that its conduct in fact complied with the rule. Therefore, Capitol respectfully submits that no forfeiture is warranted on the basis of this legitimate mistake.

E. The Bureau's Finding of Egregious Misconduct by Capitol is Erroneous

14. In applying the adjustment criteria set forth in the Commission's Policy Statement, Standards for Assessing Forfeitures, 6 FCC Rcd. 469 (1991) ("Policy Statement"), the NAL determined that Capitol's violations constituted "egregious misconduct." The NAL based this determination on its finding that Capitol's transmissions were not actual pages to subscribers, but were rather tests which did not serve any legitimate purposes. The NAL further based its finding of "egregious misconduct" on what appears to be its view that Capitol was deliberately seeking to undermine its primary competitor in the market by repeatedly jamming its transmissions.

15. It is doubtlessly true that deliberate actions designed to undermine market competitors, such as the use of plastic reflectors recently cited by the Commission in Cybertel Corporation et al., FCC 92-349, released July 28,

1992, would clearly constitute "egregious misconduct." However, this element of fraudulent intent was not present in Capitol's actions. Quite to the contrary of the NAL's apparent premise, Capitol's repeated testing its system stemmed from its legitimate need to solve technical problems with its system, and its system was in fact equipped to prevent interference to co-channel licensees from the tests. Therefore, the NAL's finding of "egregious misconduct" by Capitol is erroneous and no basis exists for the upward adjustment of any base forfeiture assessed against Capitol.

16. Finally, even if a base forfeiture were to be assessed against Capitol, a significant reduction of the forfeiture would be clearly warranted under the Commission's guidelines set forth in the Policy Statement on the basis of Capitol's history of overall compliance with the Commission's rules. As the Commission may officially notice and the Raymond declaration points out, Capitol has been a Commission licensee since November 1963 and it has not heretofore been cited by the Commission for violation of the rules.


II. CONCLUSION

17. Based on the foregoing, Capitol's actions in testing the group call feature of its PCP system were reasonable and legitimate, were taken in good faith, and were taken without any intent, actual or otherwise, to cause harmful interference with its co-channel competitors. Furthermore, Capitol's system was equipped pursuant to

standard industry practice with the necessary technical mechanism to avoid interference with co-channel licensees. Therefore, Capitol should not be liable for any base forfeiture. In any case, the legitimate basis for the tests -- even if otherwise mistaken -- refutes the NAL's finding of "egregious misconduct," and to the extent applicable, any base forfeiture assessed against Capitol should be significantly reduced on the basis of its history of overall compliance with the Commission's rules.

Respectfully submitted,

CAPITOL RADIOTELEPHONE
COMPANY, INC.

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Its Attorneys

September 30, 1992

EXHIBIT A

DECLARATION OF J. MICHAEL RAYMOND

J. Michael Raymond hereby states as follows:

I am Vice President and Chief Operating Officer of Capitol Radiotelephone Company, Inc. d/b/a Capitol Paging ("Capitol Paging"). My responsibilities for the company have been largely the same since I started with it in January of 1989, but I have officially held my current positions for approximately the past year. I am submitting this declaration to refute the letter dated July 30, 1992 from the Federal Communications Commission seeking to impose a fine on Capitol for its operation of station WNSX-646, a private carrier paging ("PCP") system operating on 152.480 MHz, from August 12-15, 1992.

The PCP system is controlled by a Commonwealth paging terminal in Charleston, which is the same terminal that controls Capitol Paging's common carrier paging systems. Part of the PCP system is an inhibitor made by Relm Communications, Model No. RH256NB, which is wired into the Commonwealth terminal. The inhibitor monitors the channel 152.480 MHz and "locks out" our transmitter when other licensees of 152.480 MHz are transmitting their pages. To the best of my knowledge, the inhibitor was working properly throughout August of 1991 and is still working properly.

The principal co-channel licensee which is actively using 152.480 MHz, as far as I am aware, is RAM Technologies, the licensee of WNJN-621. My understanding is that RAM also has base station transmitters on 152.480 in the Ashland, KY and Charleston, WV areas which are simulcast together. Therefore, when RAM

is transmitting, our inhibitor in Charleston will detect the signal and prevent our system from operating. We have thus properly equipped our system to prevent it from interfering with transmissions by co-channel licensees. Therefore, I do not understand at all the accusation that Capitol caused harmful interference to WNJN-621 (and possibly WNLM-930) during the period August 12-15, 1991, and to the best of my knowledge Capitol absolutely did not do so.

However, I do know that during a considerable part of 1991 RAM was interfering with Capitol's pages. Evidently RAM would turn off its inhibitor from time to time and would just "walk" all over Capitol's transmissions. I don't know whether RAM did it when the FCC inspectors visited the area, but it happened often enough that they should have picked it up.

I also deny that Capitol sent out test pages excessively. Rusty Harrison, Capitol's manager in Huntington, is separately submitting a statement explaining the circumstances surrounding the testing that was going on. The testing was for legitimate operational purposes; the amount that was done in our opinion was reasonably necessary and was related to Capitol's attempts to solve technical problems with the PCP system, including technical difficulties in attempting to meet the needs of the Greenup County Rescue Squad.

As far as the morse code issue is concerned, when the FCC inspectors came to Capitol's office in Charleston, I called the technical support staff at Commonwealth in the presence of the

inspectors and handed the phone to one of them, who personally verified with Commonwealth that the setting of the DIP switches on the terminal was correct for the morse code. Evidently, however, the inspector misread the setting on the DIP switch, because when I re-verified the setting with Commonwealth after reviewing the letter of July 30, I discovered that the DIP switch was indeed set for the "slow" speed rather than the "fast" speed. The setting was not changed to my knowledge from the time the inspector talked to the factory, when he visited our office, to the time that I rechecked the settings most recently.

However, I believed Capitol was in compliance with the morse code requirements at all times and believed that the FCC inspectors themselves had verified that this was in fact the case. Therefore, even though a mistake evidently was made when the inspectors talked to the factory, I do not understand why Capitol should be fined as a result of the mistake.

Finally, I should point out that Capitol has held an RCC license since November 1963, and it was the first licensed RCC in the state of West Virginia. To my knowledge it has never been ticketed by the FCC during all of this time, even for so-called "minor" violations. Capitol takes its responsibilities as a licensee extremely seriously; it is proud of its record in this regard; and it is extremely anxious to refute the accusations in the Commission's July 30 letter and thus to clear Capitol's name and reputation.

I declare under penalty of perjury that the foregoing statements are true and correct to the best of my personal knowledge and belief. Executed this 29th day of September 1992.

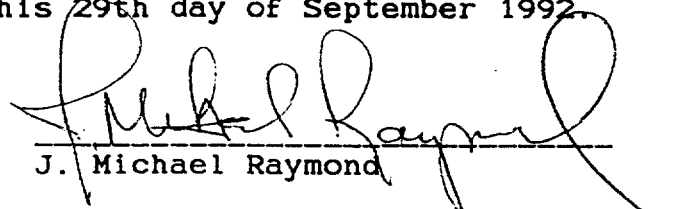

J. Michael Raymond

EXHIBIT B

DECLARATION OF RUSSELL ("RUSTY") HARRISON

I, Russell ("Rusty") Harrison, do hereby state that:

1. I am employed by Capitol Radiotelephone Company, Inc. d/b/a Capitol Paging ("Capitol") as the manager of Capitol's common carrier and private paging systems in Huntington, West Virginia, including private carrier paging ("PCP") station WNSX-646 operating on frequency 152.480 MHz. I have held this position since the Huntington office was opened in March of 1989. I am submitting this declaration in response to the letter from the Federal Communications Commission dated July 30, 1992, which claims that Capitol should pay a fine of \$20,000 for improper operation of WNSX-646 from August 12-15, 1991.

2. After Capitol got the license for 152.480 MHz in the latter part of 1990, Capitol was contacted by the Greenup County Rescue Squad, which is located near Ashland, Kentucky on the Kentucky-West Virginia border. The Rescue Squad needed paging service which would provide "group call" voice service to 10-15 members on one number, and individual service to each of its members on a second number unique to that member. The Rescue Squad was just getting organized and told me it could not afford Capitol's common carrier service, so I agreed to try to serve them on the new PCP system at a considerably lower rate.

3. Beginning in the Spring of 1990, when Capitol thought the system was ready for commercial operation, Capitol repeatedly attempted to make its PCP work to service the Rescue Squad's "group call" and individual paging requirements. We first tried to make it work with Ashland numbers, then with Huntington

numbers, then with Charleston numbers, and then with 800 numbers. The individual numbers would work, but we could not get the "group call" feature to work. We then tried different "link" frequencies between the terminal in Charleston and the base station near Huntington, because we thought the reason the system was not working properly was that our transmissions were being "walked over" by pages from WNJN-621 licensed to Ram Technologies. However, we never could get the "group call" to work properly and eventually abandoned the attempt sometime in the Fall of 1991.

4. We did a lot of testing of the PCP system while attempting to get the "group call" feature to work for the Rescue Squad. The way it would work is that we would try to get the system to work for a few days, during which we would make repeated tests. Then we would have more pressing things to do and would have to leave things alone for a few weeks or a month or so, and then we would try something different to try to get it to work, and would do some more testing. When that didn't work after a few days, we would again have to stop working on it for another few weeks or month, after which the process would be repeated.

5. I personally tested the group call feature by transmitting actual voice messages. In addition, test pages were also sent by one or more members of the Rescue Squad during this period. I estimate that, to the best of my knowledge, I would manually send about 10 voice pages a day while we were testing, which would enable us to test system operation in different

geographic areas and under different traffic conditions. Generally, these tests were done during the day, although on at least a few occasions I also conducted tests after midnight to see if the problem was being caused by co-channel interference. Additional tests were sent by the Rescue Squad, but I don't know how many.

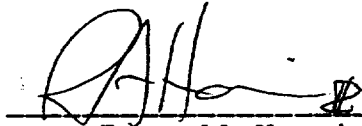
6. In addition, I would also have the auto-test feature of the Commonwealth terminal put on from time to time during late afternoon, so that I could check system coverage during my drive home from Huntington to Charleston. The auto-test feature would trigger alert-only pages and normally would be set for five minute intervals. I recall that on one occasion during this period my secretary forgot to call Charleston to have the testing turned off before she left for the evening, and the testing continued all night until she came in the next morning.

7. While I do not have specific records of when the testing occurred, I do remember that it was going on around the time that the FCC inspectors visited us in Charleston and inspected the PCP station. I was aware of their visit because I took them around part of the time to show them our facilities. To the best of my recollection, this was also about the time that my secretary forgot to turn off the auto-test during the evening.

8. The testing that Capitol did with its PCP in 1991 was the result of it attempting to make the system work properly and, in particular, the result of trying to get the "group call" feature to work for the Rescue Squad. It was not done to cause any interference to any other licensee and, to my knowledge, the

testing did not interfere with other licensees because we kept an inhibitor on our system. In fact, trying to make the system work for the Rescue Squad in the first place was as much an act of charity as anything, and to have that turned into the accusations in the FCC letter is most unfair and distressing.

9. This Declaration is signed this 29th day of September, 1992 under penalty of perjury under the laws of the United States.



Russell Harrison

<u>Federal Communications Commission</u>	
Docket No. <u>93-231</u>	Exhibit No. <u>14</u>
Presented by <u>PRIVATE RADIO BUREAU</u>	
Disposition	Identified <u>✓</u>
	Received <u> </u>
	Rejected <u>✓ 2/4/94</u>
Reporter <u>M.K.F.</u>	
Date <u>2/1/94</u>	

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14

PRIVATE RADIO BUREAU EXHIBIT NO. 14
CORRESPONDENCE
FILE

RECEIVED

NOV 18 1973

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matters of

Application of

Capitol Radiotelephone Inc.
d.b.a. Capitol Paging
1420 Kanawha Blvd. E.
Charleston, West Virginia 25301

PR Docket No. 93-231

For a Private Carrier Paging Facility
on the Frequency 152.480 MHz in
Huntington/Charleston, West Virginia

and

Imposition of Forfeiture Against

Capitol Radiotelephone Inc.
d.b.a. Capitol Paging
1420 Kanawha Blvd. E.
Charleston, West Virginia 25301

Former Licensee of Station WNSX-646
in the Private Land Mobile Radio
Services

and

Revocation of License of

Capitol Radio Telephone Inc.
d.b.a. Capitol Paging
1420 Kanawha Blvd. E.
Charleston, West Virginia 25301

Licensee of Station WNDA-400 in the
Private Land Mobile Radio Services

and

Revocation of License of

Capitol Radio Telephone Inc.
d.b.a. Capitol Paging
1420 Kanawha Blvd. E.
Charleston, West Virginia 25301

No. of Copies rec'd
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Licensee of Station WNWW-636 in the)
Private Land Mobile Radio Services)
and)

Revocation of License of)

Capitol Radiotelephone Company, Inc.)
1420 Kanawha Boulevard East)
Charleston, West Virginia 25301)

Licensee of Station KWU-373 in the)
Public Mobile Radio Service)

and)

Revocation of License of)

Capitol Radiotelephone Company, Inc.)
P. O. Box 8305)
South Charleston, West Virginia 25303)

Licensee of Station KUS-223 in the)
Public Mobile Radio Service)

and)

Revocation of License of)

Capitol Radiotelephone Co., Inc.)
1420 Kanawha Boulevard East)
Charleston, West Virginia 25301)

Licensee of Station KQD-614 in the)
Public Mobile Radio Service)

and)

Revocation of License of)

Capitol Radiotelephone Company, Inc.)
1420 Kanawha Boulevard)
East Charleston, West Virginia 25301)

Licensee of Station KWU-204 in the)
Public Mobile Radio Service)

To: Capitol Radiotelephone Inc. d.b.a. Capitol Paging

PRIVATE RADIO BUREAU'S REQUEST
FOR PRODUCTION OF DOCUMENTS

The Chief, Private Radio Bureau, by his attorneys, pursuant to Section 1.325 of the Commission's Rules, hereby requests that Capitol¹ produce the following documents for inspection and copying at the offices of the Land Mobile and Microwave Division, Private Radio Bureau, 2025 M Street, N.W., Room 5202, Washington, D.C., within ten (10) days.

Definitions and Instructions

a. "Document" means handwritten, printed, typed, computerized or visually or aurally reproduced material of any kind, and means the original (or duplicate original) and any non-identical copies thereof (whether different from the original because of notes made on or attached to such copy or otherwise), drafts or amendments thereof, including but not limited to, all writings, correspondence, memoranda (including memoranda of oral conversations), minutes, resolutions, agendas, notices, diaries, notes (including notes of meetings), papers, calendars, lists, records of telephone conversations, instructions, guidelines, affidavits, receipts, promissory notes, agreements, contracts or any other documentary materials of any nature whatsoever including computer files, in the possession, custody, or control

¹ For purposes of this Request for Production of Documents, Capitol means any of the licensees captioned above. When a request refers to Capitol, this includes principals, officers, employees (including full or part-time sales persons), agents, contractors and/or subcontractors of Capitol when acting for Capitol in any capacity.

of Capitol.

b. "Relate to," "relating to," "regarding," and "in regard to" mean constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or in any way is pertinent to the specified subject, including documents concerning the preparation of other documents.

c. "Person" or "persons" includes natural persons, corporations, partnerships, associations, and other legal entities, and governments or governmental bodies, commissions, boards, agencies, or entities.

d. "Station" means Private Carrier Paging (PCP) station WNSX-646.

e. "Or" means "and/or."

f. References to the masculine include references to the feminine.

g. References to the singular also include the plural, and vice versa.

h. Each document produced should be identified by the number of the document request to which it is responsive.

i. If any document which exists or existed is currently unavailable, explain why it is not currently available.

j. This request is continuing in character, requiring supplemental responses if further or different documents are obtained during the pendency of this proceeding.

k. Any documents requested which Capitol has previously submitted to the Commission may be identified by the date of the

transmittal and the identity of the sender, in lieu of resubmitting the documents.

Documents Requested

1. Documents relating to the preparation of the application for the station.
2. Documents relating to the ordering, purchasing, leasing or other acquisition and installation of equipment to construct and operate the station.
3. Documents relating to advertising of private carrier paging service by Capitol.
4. Documents relating to contracts, agreements, bills or communications with private carrier paging customers.
5. Books, ledgers or other records of payments received by Capitol for private carrier paging service.
6. Documents relating to complaints of interference on the station's frequency, 152.480 MHz.
7. Documents relating to any contract or communication between Capitol and any person regarding employment, services, fee or payment in connection with efforts to resolve complaints of interference.
8. Documents relating to the acquisition, whether by purchase or otherwise, or installation of equipment related to resolving complaints of interference.
9. Documents relating to the acquisition or installation of equipment or adoption or use of procedures to avoid causing harmful interference in compliance with Section 90.403(e) of the

Rules and to reduce interference in compliance with Section 90.173(b).

10. Documents relating to cooperation with other licensee(s) on the station's frequency to resolve any problem of harmful interference by mutually satisfactory arrangements in compliance with Section 90.173(b).

The Bureau believes the requested documents may contain relevant information regarding the issues specified in this proceeding or are reasonably calculated to lead to the discovery of admissible evidence. See Section 1.311(b) of the Commission's Rules. Specifically, the requested documents will clarify whether Capitol obtained the license for and operated PCP station WNSX-646 for the purpose of causing harm to the PCP licensee(s) operating on its frequency and whether it made misrepresentations to the Commission concerning its purpose and operations.

Respectfully submitted,
Ralph A. Haller
Chief, Private Radio Bureau

By:



Carol Fox Foelak
Attorney



Y. Paulette Laden
Attorney

Federal Communications Commission
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November 18, 1993